

SMITH, SOVIK,  
KENDRICK & SUGNET

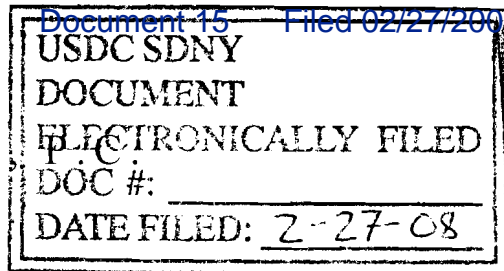
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JOHN TIMOTHY SMITH (1902-1964)  
NELSON J. SMITH (1923-1967)  
MARTIN F. KENDRICK (1917-1983)  
LAURENCE SOVIK (1904-1998)

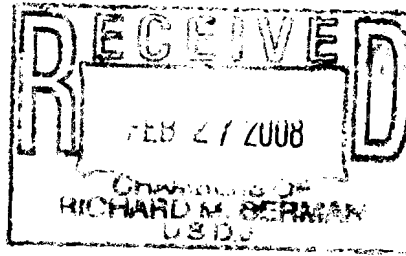
WILLIAM E. SUGNET, RETIRED  
JAMES A. O'SHEA, RETIRED

LAURENCE F. SOVIK  
JAMES D. LANTIER  
MICHAEL P. RINGWOOD  
KEVIN E. HULSLANDER  
ERIC G. JOHNSON  
STEVEN WARD WILLIAMS  
JAMES W. CUNNINGHAM  
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ALICIA M. TISDELL  
DANIEL R. RYAN  
KELLY C. MURRAY  
SUZANNE K. LEHMAN  
MICHELLE M. WESTERMAN  
JOSE E. PEREZ

February 26, 2008

**VIA Federal Express**

The Honorable Richard M. Berman  
United States District Court  
Southern District of New York  
500 Pearl Street  
New York, New York 10007



**DEMO ENDORSED**  
P4

**RE: Pete Livingston v. Keya Morgan and Keya Gallery**  
**Case No. 07-CV-7835 (RMB) (KNF)**  
**Response to Defendants' Letter dated February 20, 2008 requesting a Pre-Motion Conference pursuant to Individual Practice, 2(A)**

Dear Judge Berman:

Pursuant to your Honor's Order dated February 21, 2008, I submit Plaintiff's response to Defendants' letter requesting a pre-motion conference regarding Defendants' intention to file a motion to dismiss Plaintiff's complaint.

This Court does not lack subject matter jurisdiction over Plaintiff's claims. Defendant misconstrues the facts of the voluntary dismissal in the case filed in the United States District Court for the Northern District of California. Pursuant to Federal Rule of Civil Procedure 41(a)(1), a plaintiff may voluntarily dismiss a complaint against a defendant without order of the Court at any time before defendant answers the complaint. As Defendants never appeared in the California case or filed an answer, Plaintiff voluntarily dismissed the action without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1) against these Defendants. Therefore, the

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voluntary dismissal against Defendants was effective at the moment the notice was filed and the Court thereafter lost jurisdiction over Defendants. See Thorp v. Scarne, 599 F.2d 1169, 1176 (2<sup>nd</sup> Cir. 1979); see also Commercial Space Management Co. v. Boeing Co., 193 F.3d 1074, 1076-77 (9<sup>th</sup> Cir. 1999). Indeed, as the Court of Appeals stated “there is nothing the defendant can do to fan the ashes of that action into life and the court has no role to play.” Thorp, 599 F.2d at 1176. Therefore, because Defendants were no longer involved in the California case, Defendants could not be dismissed from the lawsuit a second time thereby invoking the “double dismissal rule” and adjudicating the case on the merits as to Defendants. Plaintiff filed a second notice of dismissal with prejudice as to all Defendants, but Plaintiff moved to correct that second dismissal to apply only to the other defendant in the California case, Nova Wines. This second dismissal with prejudice and Plaintiff’s motion to correct the second dismissal to only relate to Nova Wines is currently before the California Court on motion.

Plaintiff’s copyright infringement claim was timely filed. To the extent some of Plaintiff’s claims accrued outside the three (3) year statute of limitations period, the doctrine of equitable tolling preserves those claims. Plaintiff initially filed a complaint against Defendants in the United States District Court for the Northern District of California on or about April 5, 2006 alleging the same causes of action alleged in his complaint filed in the Southern District of New York. Plaintiff made numerous attempts to serve Defendants with the California summons and complaint, but Defendants evaded service at every opportunity. It was not until Defendants moved to set aside a default judgment that they argued the case belonged in New York because that is where the allegations against Defendants took place. Thus, because Defendants

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repeatedly evaded service of the California complaint and never appeared in the action, Plaintiff did not learn that the proper forum for his claims against Defendants might be in New York until almost one (1) year after he filed his initial Complaint.

“The equitable tolling doctrine allows a district court to toll the statute of limitations when a plaintiff initially asserted his rights in the wrong forum.” Polanco v. U.S. Drug Enforcement Admin., 158 F.3d 647, 655 (2<sup>nd</sup> Cir. 1998); Johnson v. Nyack Hosp., 86 F.3d 8, 12 (2<sup>nd</sup> Cir. 1996). Plaintiff must show that he passed with reasonable diligence during the period he would like tolled. Polanco, 158 F.3d at 655. As discussed above, Plaintiff made several efforts to serve Defendants and to determine the proper address at which to serve Defendants, but to no avail. Thus, the statute of limitations period should be tolled preserving Plaintiff’s copyright infringement and conversion claims falling outside the three (3) year period prior to the filing of his New York complaint.

Further, Defendants’ Federal Rule of Civil Procedure 12(b)(6) claim is without merit. Plaintiff is not required to plead his case with heightened specificity. As discussed in Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1973-74 (2007), the Supreme Court does not “require heightened fact pleading of specifics, but only enough facts to state a claim for relief that is plausible on its face.” Plaintiff’s Complaint pleads facts sufficient to state a claim for copyright infringement and conversion. The facts as alleged show (1) Plaintiff owned the copyright to the photographs and Defendants copied Plaintiff’s copyrighted work; and (2) Defendants converted Plaintiff’s copyrighted materials for their own use.

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Sincerely,

Steven Williams pg

Steven Ward Williams

/skl

CC: Kenneth R. Silverman, Esq. (via Federal Express and Facsimile)  
Attorney for Defendants

Conference on 3/11/08 (A)  
9:15 A.M.

SO ORDERED:  
Date: 2/27/08 Richard M. Berman  
Richard M. Berman, U.S.D.J.